IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 62164-5-I
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
	)	
TODD A. OLSON,	)	
	)	
Appellant.	)	FILED: June 14, 2010
	)	
	)	

Schindler, J. —Todd A. Olson challenges his conviction and sentence for driving while under the influence of alcohol, hit and run, and driving with a revoked license. Olson argues that the trial court abused its discretion in denying his motion for a mistrial because the State violated the court's ruling precluding a police officer from giving opinion testimony based on a field sobriety test. Olson also challenges the sentence on the grounds that the term of confinement and community custody could exceed the statutory maximum. Because the court did not abuse its discretion in denying the motion for a mistrial, and the sentence complies with the recent decision in In re Pers. Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), we affirm.

FACTS

On the evening of March 24, 2008 at around 8:00 p.m., Todd A. Olson's car struck the back of Sheikh Demba's car while Demba was stopped at a traffic light in Lynnwood. Olson then backed up and drove away.

Michael Rinkus and Elizabeth Bretland witnessed the collision. Bretland called 911. Rinkus and Bretland followed. Olson was speeding and not stopping for lights.

Olson got out of his car at an apartment complex. After unsuccessfully trying to enter an apartment, he walked around to a back patio. Rinkus followed Olson on foot and did not lose sight of him. Rinkus noticed that Olson's face was red and when Olson was "in close contact, within talking distance, six to ten feet, I could smell somewhat of an odor . . . definitely some kind of intoxication I could smell."

After Lynwood Police Officer Jacob Shorthill and Officer Kenneth Harvey arrived at the apartment complex, Rinkus identified Olson. Officer Shorthill placed him under arrest. Officer Harvey read Olson his Miranda[1] warnings.

Officer Shorthill observed that Olson had "glassy, watery eyes" and his speech was a little slurred. Officer Harvey said that Olson "was having a hard time balancing and that he was staggering as he walked" and "his eyes were watery and bloodshot in appearance and also droopy in appearance." Officer Harvey also noticed "a medium odor of an alcohol beverage emanating from his mouth as he spoke," and that Olson's face was slightly red.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Olson agreed to take a field sobriety test. Officer Harvey began performing a nystagmus gaze test to determine whether Olson could follow a pointer with his eyes without involuntarily moving his eyes. Officer Harvey had to repeatedly tell Olson to keep his head still during the test. Officer Harvey observed involuntary eye movement. Olson declined to continue taking the nystagmus gaze test or other field sobriety tests.

At the police station, Officer Harvey read Olson the implied consent warning for taking an alcohol breath test. Olson refused to take the breath test.

The State charged Olson with driving while under the influence of intoxicating liquor (DUI) in violation of RCW 46.61.502, hit and run in violation of RCW 46.52.020, and driving while license revoked in the first degree in violation of RCW 46.20.342(1)(a).

Olson filed a motion in limine to exclude the police officers from testifying about whether he was intoxicated because the State did not identify the police officers as expert witnesses. The court granted the motion, but ruled that the officers could testify as lay witnesses about their observations of whether he was intoxicated.

> The state's position is that the intent is to have the officer testify in relation to lay testimony, not expert testimony. Therefore, the question is going to have to be couched in relation to the opinion based upon your observations. In that questioning, there will not be any reference relating to training or expertise for purposes of reaching that conclusion or that opinion.

Officer Harvey, Officer Shorthill, Rinkus, Bretland, and Demba testified at trial

on behalf of the State. Olson's defense was that there was no proof his drinking affected his driving. Olson also claimed that the contact between his car and Demba's was very minor and that Demba exaggerated the incident.

Before Officer Harvey's testimony, Olson moved to prevent Officer Harvey from testifying about the results of the nystagmus gaze test. The court ruled that Officer Harvey could testify about what he observed in performing the test, but could not offer his opinion about the results.

> I will permit him to testify to his facts and what he observed in relation to the nystagmus gaze, but I will not permit him to offer an opinion in relation to it.
>
> So to be clear, in relation to the other argument concerning the basis for his opinions related to intoxication, if the question is going to be asked . . . there's going to have to be a qualifier in the question, "[b]ased upon your observations, excluding the nystagmus gaze test." I will not permit that to be a part of the basis for the opinion in relation to intoxication because that is outside the purview, I believe, of a lay witness. That is not something a lay witness would know.[2]

During direct examination, the prosecutor asked Officer Harvey whether based on his observations, he had an opinion about whether Olson was under the influence of alcohol, but did not ask Officer Harvey to exclude the nystagmus gaze test from the answer. Officer Harvey testified that he thought Olson was intoxicated. Olson began to object, but withdrew the objection.

> Q Officer, based on your observations of Mr. Olson on that day, did you have an opinion about whether he was under the influence or affected by alcohol?

[2] The court described the ruling as preliminary, but appeared to confirm the ruling after further argument. "He can't ask that [did he have an opinion as to whether he's intoxicated] in relation to the field nystagmus test."

> A My opinion is that he was intoxicated.
> MR. WACKERMAN: Your Honor, we would -- we'll withdraw.
> THE COURT: I didn't hear what you said.
> MR. WACKERMAN: Withdraw the objection.

On redirect, the court sustained Olson's objection to the prosecutor's question about whether Officer Harvey had an opinion about whether Olson's driving was affected by alcohol.

> Q Mr. Wackerman asked you about seeing any driving of Mr. Olson, and you said you didn't see any. Based upon your observations of him, do you have an opinion about whether his driving would be affected by alcohol?
> MR. WACKERMAN: Objection. Calls for speculation.
> . . .
> THE COURT: I'm going to sustain the objection.

The court later stated that it sustained the objection because the question called for an opinion.

At the conclusion of Officer Harvey's testimony, Olson moved for a mistrial based on the officer's opinion testimony about Olson's intoxication. The court ruled that it would have sustained a timely objection to the prosecutor's question that did not exclude the nystagmus gaze test, but that there was no basis for a mistrial because the objection was not timely.

> MR. WACKERMAN: . . . I think the court's ruling was very clear, that in allowing the testimony about the horizontal gaze nystagmus, that the state was allowed to ask the ultimate opinion question about intoxication so long as it was excluding the horizontal gaze nystagmus.
> The state asked the ultimate opinion questions about intoxication and never excluded that from its questions. There was not an immediate objection because I saw that there was no

> . . . immediate way to –
>
> THE COURT: Well, there was no objection at all. Then you withdrew it. You made a comment that I didn't hear, and then you said you withdrew it.
>
> So I don't believe it's appropriate to ask for a mistrial when the objection was not made. If the objection would have been made to the form of the question, I would have sustained the objection because it didn't exclude the nystagmus gaze. But I don't believe the objection was made, and I don't think it's timely made at this time.

Olson argued that an immediate objection would have underscored the problem to the jury. The court ruled that there had been time before Officer Harvey answered the question for Olson to object, just as with the question during redirect about whether Olson's driving was affected.

> THE COURT: . . . there was sufficient time in between the time the question was asked and the response was made in which an objection could have been made. So it wasn't a situation where there was no time to make the objection.[3]

The jury convicted Olson as charged with DUI, hit and run, and driving while license revoked in the first degree. With an offender score of 11 for the DUI conviction, the court imposed a standard range sentence of 60 months and a term of community confinement of 9 to 18 months. The judgment and sentence states that "[t]he combined term of community placement or community custody and confinement shall not exceed the statutory maximum."[4]

[3] The court also described the prior ruling about Officer Harvey's opinion testimony as "instructions for how to avoid the issue" rather than "an actual ruling."

[4] The court imposed 365-day sentences for the hit and run and driving with license suspended counts, with the terms for all three counts to be served consecutively.

ANALYSIS

Motion for Mistrial

Olson argues that the court abused its discretion in denying his motion for a mistrial. Olson contends that a mistrial was warranted because the State violated the court's ruling to exclude Officer Harvey's opinion testimony about his intoxication based on the field sobriety test.

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006).

To determine whether a trial irregularity warrants a new trial, we consider three factors: (1) the seriousness of the irregularity, (2) whether the testimony was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to the jury to disregard the remark or the testimony. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

Relying on State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001), Olson argues that Officer Harvey's opinion testimony about the field sobriety test was prejudicial and could not have been cured by a limiting instruction under the factors set forth in Escalona because of the officer's "aura of special reliability and

trustworthiness." Demery, 144 Wn.2d at 762.[5]

In Demery, the police officer commented on the defendant's credibility in a taped interview. Demery, 144 Wn.2d at 759. The court concluded that the defendant's credibility was an issue for the fact finder at trial, but that the police technique used in the interview did not carry an "aura of reliability." Demery, 144 Wn.2d at 764-65.

Here, the challenged testimony was Officer's Harvey's opinion about whether Olson was intoxicated, not Olson's credibility. Officer Harvey's testimony was based in part on several observations he made concerning whether Olson was intoxicated. Officer Harvey testified that Olson staggered, his eyes were bloodshot, and there was a smell of alcohol on his breath. And although the prosecutor's question about Officer Harvey's opinion as to Olsen's intoxication failed to exclude the field sobriety test as instructed by the court, neither the question nor the officer's answer drew attention to the field sobriety test.

> Q Officer, based on your observations of Mr. Olson on that day, did you have an opinion about whether he was under the influence or affected by alcohol?
> A My opinion is that he was intoxicated.

On redirect, the prosecutor's questions underscored that Officer Harvey was not testifying as an expert:

> Q You used the word "intoxicated" to describe Mr. Olson. And that can encompass different things for different people. And I would like you to describe in layman's terms more along the lines of what you meant.

[5] (Internal quotations omitted.)

A A better term would be "drunk." I don't know a better term to put it in that's not a technical term.
Q Okay. And that was your observation of Mr. Olson?
A Yes.

In addition to Officer Harvey's testimony, there was other evidence of Olson's intoxication. Officer Shorthill testified that Olson's eyes were "glassy" and watery, and his speech was slurred. Rinkus testified that Olson's face was red and he could smell an odor suggesting intoxication from over six feet away. And there is no dispute that Olson did not request a limiting instruction.

The court did not abuse its discretion in denying the motion for a mistrial.

Sentence

Olson asserts that the trial court exceeded its authority by imposing a sentence where the combined term of confinement and community custody could exceed the statutory maximum.[6] Olson contends that the statement in the judgment and sentence that "[t]he combined term of community placement or community custody and confinement shall not exceed the statutory maximum" does not make the sentence valid.

The recent Washington Supreme Court decision in Brooks controls. Brooks, 166 Wn.2d at 674-75. In Brooks, the court held that when a sentence potentially exceeds the statutory maximum because of a combination of incarceration and

[6] RCW 9.94A.505(5) states in pertinent part that "a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW."

community custody, the sentence is not indeterminate or otherwise invalid if it states that the combined term of community custody and confinement shall not exceed the statutory maximum. Brooks, 166 Wn.2d at 674-75.[7]

We affirm.

Schindler, J.

WE CONCUR:

Leach, A.C.J.

Appelwick, J.

[7] Olson also contends that the sentence violates the separation of powers doctrine because the sentence is indeterminate and the legislature did not delegate authority to the Department of Corrections (DOC) to set the length of community custody. Under Brooks, the sentence is not indeterminate. Brooks, 166 Wn.2d at 674. The sentence also does not violate separation of powers principles. See Brooks, 166 Wn.2d at 674, ("[i]t is the SRA itself that gave courts the power to impose sentences and the DOC the responsibility to set the amount of community custody to be served within that sentence."); In re Personal Restraint of West, 154 Wn.2d 204, 213, 110 P.3d 1122 (2005) ("sentencing courts have no authority to restrict the imposition of earned early release time"); State v. Jones, 126 Wn. App. 136, 143-44, 107 P.3d 755 (2005) ("it is the DOC, not the sentencing court, that determines where in the range the defendant's term falls.").